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NO. 83-808

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STATE OF MARYLAND,

Petitioner

v.

DORIS ANN FOSTER,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is this an appropriate case for review by writ of certiorari?

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OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported at 297 Md. 191, 461 A.2d 504 (1983).

JURISDICTION

Respondent was convicted of felony murder on February 1, 1982 and a death sentence was imposed. Both the conviction and sentence were appealed to the Maryland Court of Appeals pursuant to Maryland Annotated Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 414, and on June 7, 1983, the conviction was reversed on grounds that Respondent had been deprived of a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.

This Court's jurisdiction to review the decision of the Maryland Court of Appeals is invoked by the State of Maryland under 28 U.S.C. Sec. 1257(3).

STATEMENT OF THE CASE

On February 1, 1982, Respondent was convicted of felony murder after a jury trial in the Cecil County Circuit Court. One of the State's primary witnesses was the Respondent's sixteen-year-old daughter, who testified that in exchange for her agreement to testify against Respondent, the State had agreed not to prosecute her for murder. According to the daughter, she and the Respondent had returned to Respondent's motel room on the evening of January 29, 1981, after consuming a considerable amount of beer, and Respondent began to discuss robbing the victim, the owner of the motel. The Respondent armed herself with a screwdriver, and the two of them lured the victim into an empty motel room, where Respondent stabbed her. In an effort to stop her mother, the daughter told her the police were coming, and they then returned to Respondent's motel room where they continued drinking beer. The daughter testified that Respondent then stated

she had to kill the victim and returned to the motel room where the stabbing had occurred. When she returned to her own motel room she told her daughter that she had stabbed the victim in the heart. Around midnight they picked up Respondent's husband at work and he helped them dispose of the body.

According to the testimony of Respondent's husband, after he was told of the murder he cleaned up the motel room where the murder occurred, put the body in the car and drove to the Chesapeake and Delaware Canal. There he tied a concrete block to the body, dropped it in the Canal, and returned to the motel, where they took money and other items from the victim's room.

On cross-examination Respondent's husband admitted that although he had been charged with the murder, he had arranged a plea bargain to plead guilty to lesser charges in exchange for his testimony against Respondent. In addition, two letters were introduced into evidence by the defense in which Respondent's husband confessed to having committed the murder, one dated January 30th and allegedly written to the Respondent, and another postmarked June 19th and addressed to the "Attorney General, Cecil County, Md." Although at trial he denied having written the January letter, he had told a police officer on May 11th that the letter's contents were true. He acknowledged having written the June 19th letter, but stated he had done so to protect the Respondent.

On cross-examination Respondent's husband was also asked if he had verbally threatened the victim in January when she asked him for the rent, and he stated that he could not recall having done so. Respondent then called Helen Douglass, a friend of the victim, to impeach this testimony and to show that in January Respondent's husband had threatened to kill the victim. Upon the State's objection, a conference in

chambers revealed that the witness would have testified that the victim had called her on January 12th in a highly agitated state and had told Douglass that she feared for her life. She told her that Respondent's husband had threatened to kill her. Although the trial judge found that the proffered hearsay was necessary for Respondent's defense, he decided that it was too unreliable to be admitted.

Respondent testified that she had been asleep at the motel on the night of the murder, that when she awoke she saw the victim lying dead on the grass, and that her daughter and husband subsequently disposed of the body.

On this evidence the jury convicted Respondent of felony murder, and at sentencing by the court the death penalty was imposed. On appeal to the Court of Appeals, Respondent's conviction was reversed on grounds that exclusion of the proffered hearsay violated due process. On July 7, 1983, Petitioner filed a motion for reconsideration, which was denied on September 16, 1983.

REASONS FOR DENYING THE WRIT

There are no "special and important reasons" for reviewing this case.

Petitioner contends that Foster v. State sets forth a "novel interpretation" of this Court's decisions in Chambers v. Mississippi, 410 U.S. 284 (1973) and Green v. Georgia, 442 U.S. 95 (1979): i.e., that the due process clause "preclude[s] states from applying the rules of evidence to criminal defendants." [Pet. 9] This is, of course, an obvious distortion of the real holding in Foster. The Court of Appeals merely held that as applied in that case,

"...[T]he hearsay rule excluded evidence that was critical to the defense and that bore persuasive assurances of trustworthiness. As a result of this exclusion, the accused's defense was far less persuasive than it might have been had the husband's

threat been admitted. Under the facts and circumstances of this case, the exclusion of exculpatory hearsay evidence deprived the accused of a fair trial and, therefore, of due process of law." [Pet., Apx. 21a]

Therefore this case does not stand for the absurdly broad proposition of law suggested by Petitioner. Indeed it does not set forth either a new legal principle or a new interpretation of Chambers and Green. It merely applies the principle articulated in those cases to a particular set of facts; and as this Court has pointed out on numerous occasions, it does not grant a writ of certiorari merely to engage in evaluations of evidence with respect to settled principles of law:

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair minded judges could find it tilting either way. It is not a place for us to invite review by this court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference' where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Com. v. American Tobacco Co., 274 U.S. 543 ..." National Labor Relations Board v. Pittsburgh Company, 340 U.S. 498, 503 (1951).

See also General Talking Pictures Corp. v. Western Electric Co., Inc., 304 U.S. 173, 178 (1938) ["Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."]; United States v. Johnston, 268 U.S. 220, 227 (1925) ["We do not grant a certiorari to review evidence and discuss specific facts."]; Houston Oil Company of Texas v. Camelia G. Goodrich, 245 U.S. 440, 441 (1918) [dismissing a writ of certiorari as improvidently granted where "[t]he propriety of submitting these matters depended essentially upon an appreciation of evidence."].

It should also be noted that among the various reasons for denying a writ of certiorari set forth by this Court in State of Maryland v. Baltimore Radio Show, 338 U.S. 912, 918 (1950) is that "the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law ..." Judge Eldridge, concurring in the denial of the motion for reconsideration in this case, indicated that the holding is supportable under Maryland state law as well as the federal constitution. [Pet., Apx. 38a-43a]. The Foster opinion itself suggests that the excluded testimony might be admissible under Maryland's hearsay rules in view of prior cases holding that an accused's threat to kill the victim is admissible in a murder case, and that an extrajudicial confession by someone other than the accused is also admissible. [Pet., Apx. 18a]. As a consequence, even if this Court were to grant further review and were to reverse the Maryland Court of Appeals on the due process question, the Court of Appeals on remand could nevertheless reverse the conviction under State law. Oregon v. Hass, 420 U.S. 714, 719 (1975).

Petitioner has engaged in lengthy analysis of the evidence in this case in an attempt to distinguish Foster from Chambers, Green, and other cases applying the Chambers/Green analysis. However, it has failed to present any valid reason why this Court should grant further review. It warns against "severe consequences to the criminal law" if "established rules of evidence" are no longer deemed applicable to criminal defendants [Pet. 18], but there is clearly no federal interest involved in preserving a state's "established rules of evidence." In fact, this is an area in which this Court has consistently refused to interfere absent a Constitutional violation:

"To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It

would be a wholly unjustifiable encroachment by this Court upon the constitutional power of the States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provisions of the United States Constitution ..." Spencer v. Texas, 384 U.S. 554, 568-69 (1967).

Although Chambers and Green established certain due process limitations on the States' autonomy in evidentiary matters, this Court did not thereby undertake supervision of State criminal trials.

By predicting dire consequences to the criminal law not only of Maryland, but also of other states if Foster is upheld, Petitioner is merely attempting to invest this case with a significance it does not possess. Chambers and Green have been invoked in numerous state and federal cases, with varying results. [See footnote 4 in Foster, Pet., Apx. 17a-18a]. Under Supreme Court Rule 17, however, a writ of certiorari will be granted "only when there are special and important reasons therefor," and "... '[s]pecial and important reasons' imply a reach to a problem beyond the academic or episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). Because of the great variety of factual situations in which Chambers might conceivably be invoked, review of the instant case would only address an "episodic" problem.

Foster v. State is squarely governed by the principles set forth in Chambers and Green.

Respondent does not believe that review of this case is appropriate regardless of the merits of Petitioner's contention. However, it seems clear that Chambers and Green should apply here. As the Court of Appeals points out in its decision, evidence of the husband's threats to kill the victim were critical to Respondent's defense that it was her husband, not she who had committed the murder. Furthermore, the indicia of reliability in the hearsay excluded in Foster are remarkably similar to

the reliability factors cited in Chambers. In both cases the statements were made spontaneously and were corroborated by the declarant's confessions to the crime; and in both the declarant was available for cross-examination. [Pet., Apx. 13a; 20a].

Petitioner reviews a number of cases rejecting the Chambers analysis in an effort to show "how far afield the Foster court has strayed." [Pet. 14]. However, none of these is factually apposite to Foster. For example, in United States v. Hinkson, 632 F.2d 382 (4th Cir., 1980), the hearsay was not corroborated by other evidence, while in Foster the declarant's threats to the victim were corroborated by two written confessions to the murder. The absence of corroborative evidence also led to rejection of the Chambers' due process arguments in United States v. McDonald, 688 F.2d 244 (1982), cert. denied, ___ U.S. ___, 103 S.Ct. 726 (1983), United States v. Beltempo, 675 F.2d 472 (2nd Cir., 1982), cert. denied, ___ U.S. ___, 102 S.Ct. 2963 (1982), and Grochulski v. Henderson, 637 F.2d 50 (2nd Cir. 1980).

Petitioner emphasizes that "[s]trict limits were imposed on the application of Chambers" [Pet. 9], but surely it does not contend that the case is of virtually no value as precedent. The language in Chambers limiting its holding to the facts of that case merely indicates that an alleged violation of due process must be judged on a case-by-case basis. The Foster court in its careful examination of the evidence made clear that it, too, was limiting its holding to the facts of this case. Thus there is no basis for Petitioner's contention that the Maryland Court of Appeals has erred in its application of Chambers.

CONCLUSION

Although Petitioner has set forth numerous reasons why it believes the Foster court erred in its application of

Chambers, it has not given any valid reasons why that decision should be reviewed by this Court. The case does not formulate a new legal principle, nor is there anything "novel" about its interpretation of Chambers. It is merely one of many state and federal cases in which a Chambers issue has been raised with varying results. Since review by this Court would neither clarify nor change the existing law, the petition should be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of December, 1983, a copy of the Brief in Opposition was hand-delivered to the Office of the Attorney General, Deborah K. Chasanow, Assistant Attorney General, Counsel for Petitioner, and Jillyn K. Schulze, Assistant Attorney General, Of Counsel, Seven North Calvert Street, 4th Floor, Munsey Building, Baltimore, Maryland 21202.

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Doris Ann Foster, who is indigent and who has been found to meet the qualifications of representation by the Office of the Public Defender for the State of Maryland, at the time of her trial and at appellate proceedings thereafter, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Respondent's affidavit in support of this Brief is attached hereto.


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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

I, Doris Ann Foster, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

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2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? *no*

(a) If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? *no*

(a) If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Doris Ann Foster
DORIS ANN FOSTER

Subscribed and sworn to before me, a Notary Public,
this 13rd day of December, 1983.



Charles R. Simone
NOTARY PUBLIC

My Commission Expires: 7/1/86

Let the applicant proceed without prepayment of
costs or fees or the necessity of giving security therefor.

JUDGE